

**REPORTS OF INTERNATIONAL
ARBITRAL AWARDS**

**RECUEIL DES SENTENCES
ARBITRALES**

Harry H. Hughes (U.S.A.) v. United Mexican States

24 October 1930

VOLUME IV pp. 617-623



NATIONS UNIES - UNITED NATIONS
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HARRY H. HUGHES (U.S.A.) *v.* UNITED MEXICAN STATES

(October 24, 1930. Pages 99-108.)

CONTRACT CLAIMS.—TERMINATION OF CONTRACT BY RESPONDENT GOVERNMENT.—BREACH OF CONTRACT.—RIGHT TO SECURITY DEPOSIT. Claimant deposited Mexican national bonds of the value of 2,000 Mexican pesos with the National Bank of Mexico as security for the faithful performance of a contract with the Mexican Government. Such contract required claimant to take possession of a specified number of mining claims within the periods stipulated therein and in amendments thereof, failing which such contract was subject to forfeiture. The Department of Public Works declared the contract forfeited for failure to fulfil its obligations and refused to return either the deposited bonds or interest accrued thereon. Claim for return of bonds *disallowed*, since obligation to take possession of claims included the obtaining of title to mining claims and since claimant was so tardy in denouncing claims that title thereto could not have been obtained within the contract periods. Claim for value of interest coupons accruing on bonds *allowed*.

Commissioner Fernández MacGregor, for the Commission:

This claim is presented by the United States of America on behalf of Harry H. Hughes against the United Mexican States, demanding the amount of \$2,240.00, Mexican gold, with interest thereon, as indemnity for losses and damages suffered by the claimant as the result of the confiscation by the Mexican Government of a deposit to guarantee the fulfillment of a mining exploration contract.

On May 24, 1904, the Mexican Government entered into a contract with the claimant wherein the latter was obliged to explore under certain conditions gold placer lands in the State of Sinaloa, Mexico, and as a guarantee for the fulfillment of the contract he deposited in the National Bank of Mexico 2,000 Mexican pesos, in three per cent Mexican national internal debt bonds. On October 12, 1905, this contract was amended so as to obligate the claimant to take possession of one hundred and fifty mining claims during the first two years counting from May 23, 1904, and of one hundred and fifty more during the third and last year which terminated on May 23, 1907. The claimant maintains that he has complied with all of his obligations for which reason he asked for the return of the bonds deposited as a guarantee; but on July 13, 1908, the Minister of Public Works denied the application of the claimant, stating that Hughes had violated the terms of his contract, thereby forfeiting the said bonds.

The respondent Government through its Agency avers, in effect, that the claimant did not comply with the terms of the contract, since he failed to take possession of the 300 mining claims within the periods stipulated in the respective contracts and that, for this reason, in the international sense of the word, there is no confiscation.

Article 7 of the contract of 1904 reads as follows:

“The said Harry H. Hughes or the company which he may organize for that purpose, is under obligation, as to the lands of the zone of exploration, to take possession of fifty claims during the first year, one hundred the second and one hundred and fifty the third, at least.”

The foregoing Article was amended by Article 2 of the contract of October 12, 1905, which reads as follows:

"The said Harry H. Hughes or the company which he may organize for that purpose, is under obligation, as to the lands of the zone of exploration, to take possession of at least one hundred and fifty claims during the period of two years counting from the date of the promulgation of the original contract, the two years to terminate on May 23, 1906, and of another one hundred and fifty within the third and last year which will terminate on May 23, 1907."

Article 9 of the first contract, left in force by the second contract, reads:

"Article 9.—This contract will be forfeited:

"I.—If the exploration is not begun within the time fixed in Article 5. II.—Through the development, without a legally obtained title, of any mine which may be located in the said zone. III.—Through failure to present the plans referred to in Article 6. IV.—Through failure to take possession of the number of claims referred to in Article 7, during any of the years referred to by that Article. In any of these cases of forfeiture the concessionaire shall lose the deposit made and also the right to continue the exploration, being subject in the second case of forfeiture, to the provisions of the respective laws.—The time limits given in this contract will be suspended in all fortuitous cases or those of *force majeure* duly proven, these time period extensions being understood to cover the entire time of the obstruction and for two months afterwards, but in order for this extension to be effective, the concessionaire shall file the notification and the proofs of the obstructing condition having taken place within the month following the date of its commencement."

Article 3 of the amended contract reads:

"Article 3.—In addition to the causes of forfeiture stipulated in paragraphs I, II and III of Article 9, this contract, as well as the one entered into on May 23, 1904, shall be forfeited as a result of failure to take possession of the number of mining claims referred to in the foregoing Article in either of the two periods to which that Article refers. The forfeiture shall be declared administratively by the Department of Public Works which in any case and before issuing the corresponding declaration, shall grant to the said Harry H. Hughes or to the company which he may organize, a period of not less than two months in which to present a defense."

In view of those Articles the determination of the case should not be very difficult, since it would be sufficient to ascertain whether the claimant in accordance with the contract had taken possession of the three hundred mining claims within the stipulated periods. But this question has become controversial inasmuch as while the claimant contends that in order to comply with the contract it was enough to denounce or to make application for the claims in question within the stipulated periods, the Mexican Government maintains through its Agency that that fact is not sufficient, since Hughes was obliged to take possession of such claims, and that, in conformity with Mexican law this could not be done until the title to each claim had been obtained. In view of this contention the claimant contends in addition, that this was not the reason given by the Mexican Government in its replies to him and that, even assuming this to be correct he could have received the titles to the three hundred mining claims within the indicated periods, but nevertheless, due to negligence attributable to the Mexican Government and not to the claimant, he did not receive them.

In order to prove the preceding the claimant alleges that his contract was a contract of exploration and not of exploitation; that in accordance therewith, he fulfilled his obligation by denouncing the claims as he had

bound himself to do, but that forfeiture was declared as a result of errors committed by the Department of Public Works in its several computations made to determine this question. He states that the first notice he received to the effect that the Mexican Government considered that he had not fulfilled his obligations is contained in a letter signed by Sr. O. Molina on June 13, 1908, and that in that letter the reason for the forfeiture was given that only two hundred and forty claims had been denounced since the mine called "Cuauhtemoc" embracing twenty-two claims could not be considered for the reasons that it had been applied for prior to the promulgation of the contract, and that, further, some of the claims had been declared forfeited because of the nonpayment of the mine tax; that the Decree of forfeiture itself which was issued two months later, on August 21, 1908, stated that he had denounced only two hundred and sixty-two claims; that Sr. Pani who represented the Government in 1922, stated that he had registered in his favor two hundred and eighty claims, but that twenty additional claims which formed the mining property called "La Conquista", could not be considered in his favor since the titles thereto had not been issued.

There is also an allegation on behalf of the claimant that the contract was not considered forfeited by the Mexican authorities inasmuch as after the three years of its duration and up till the year 1908 titles to the claims denounced were being issued under the terms of the contract.

Putting aside the secondary allegations, which will be examined later, it is pertinent to enter at once upon a study of what the contract required of Hughes. The terms of the respective contracts are clear: the contract of 1904 reads in its Article 7 quoted above: "... to take possession of fifty claims during the first year, one hundred the second and one hundred and fifty the third, at least". Article 2 of the contract of 1905, also quoted, required the claimant "... to take possession of at least one hundred and fifty claims during the period of two years counting from the date of the promulgation of the original contract."

It is necessary then to ascertain the meaning of taking possession of mining claims. This can be done only by a study of the contracts in the light of the mining legislation in force in Mexico at that time. The law is that of June 4, 1892, Article 18 of which reads:

"The approval of the proceedings having been obtained and the title to the property issued to the concessionaire, he enters in possession of the mining claims without the necessity of further formalities."

It is concluded from this provision that before receiving title, the concessionaire is not in possession of the claims covered thereby. It seems clear therefore that the claimant was obliged by the contracts in question not only to denounce or to make application for the claims, but to obtain the respective titles in order to acquire possession thereof, in compliance with the obligation he contracted and which is set forth in Articles 7 and 2 of the contracts of 1904 and 1905, respectively.

This opinion seems to be strengthened by the last part of Article 2 of the contract of 1904 which reads:

"... and if during the exploration any deposits of gold or any other metal be discovered, the concessionaire may at once, without waiting for the end of the term of exploration, apply for any claims on them that he may desire, under the terms and conditions established by the said law of June 4, 1892, not being permitted, however, to undertake any exploitation of those claims until he shall have obtained the title thereto."

The claimant undoubtedly made the denouncements or simple applications for title according to the terms of his contracts; but the titles themselves were issued in some cases subsequent to the period of three years mentioned in these contracts, as is seen in the following table:

Date of Application	Name of the Property	Area	No. and date of Title
		<i>Hectares</i>	
May 27, '05	"Cuauhtemoc"	50	30214, Feb. 23, '06.
June 5, '05	"Lucky William"	10	30579, Mar. 31, '06.
Jan. 13, '06	"Oro Escondido"	70	32884, Nov. 7, '06.
Feb. 18, '07	"El Lucero"	150	44251, Nov. 11, '08.
Dec. 21, '05	"La Conquista"	20	Petition 551.
		<hr style="width: 10%; margin: auto;"/> 300	

If then, the claimant had to obtain titles to the three hundred claims which he was obliged to apply for during the three years of his contract, and did not obtain them, it is necessary to ascertain whether this was due to the negligence of the claimant or to that of the Mexican Government.

The claimant obligated himself, as has been seen, to obtain his titles in conformity with the law. Chapter 3 of the mining law regulation of June 25, 1896, outlines the procedure to be followed in order to obtain mining concessions. The applications are filed with a special official called Agent of Public Works (*Agente de Fomento*) who, within the three days following such filing will appoint a surveyor to survey the claims and make the necessary plans, etc.; in case of acceptance the surveyor has sixty days to perform the work entrusted to him; at the time of fixing the term for the surveyor previously mentioned, the Agent of Public Works posts on the bulletin board which is required to be on the outside of all Agencies, an extract of the application for the mining concession, so that third persons who believe themselves possessed of a right may exercise it at once, and this notice must remain exposed to public view for one month; a like extract must be published in the newspaper three times; in the said extracts the public is advised that a fixed period of four months has been allowed during which the proceedings before the Agency will be heard. It is to be noted that that period cannot be decreased because it is in favor of third persons in general it is a necessary period which cannot be avoided. If at the end of the four months no one is opposed to the granting of the title, the Agency will make a copy of the proceedings within fifteen days thereafter and forward it to the Department of Public Works which in view of the record will issue the title.

It is perfectly clear, in view of the foregoing, that a title cannot be issued by the Mexican authorities until at least five months have elapsed from the date of the application. Now from the evidence submitted by both sides it appears that during the first two years Hughes obtained possession of only sixty claims of the mining properties, Cuauhtemoc (50) and Lucky William (10), since those corresponding to the mining property Oro Escondido (70) were applied for on January 13, 1906, that is to say, four months and some days before the expiration of the first period of two years, when the Mexican Government could not in any manner issue the titles during the lawful time; and that the last of the claimant's applications, although made within the time limit fixed in Article 2 of the contract of 1905, was also outside the period during which the title could have been lawfully issued, namely the application made on February 28, 1907, for the mining property named "El Lucero", which included one hundred and

fifty of the very claims, possession of which should have been taken during the third year of the contract. As the contract ended on May 23, 1907, and as there are only three months between the 23rd of February and the 23rd of May, the claimant by his own act made it impossible to receive within the time period of the contract the title to these claims, and consequently to take possession of them, since it was impossible to comply in those three months with the requisites of the Mining Law Regulation of 1892, which has been previously referred to. Assuming that the Agent of Public Works and that Department had acted with the greatest possible rapidity the title would have been issued at the very earliest on July 23, 1907, when the contract of the claimant had already lapsed.

It is clear, therefore, that the claimant did not comply with the terms of his contract and that the Government of Mexico was within its rights in declaring administratively the forfeiture of Hughes' contract and in applying to its benefit the deposit made as a guarantee for the fulfillment thereof. Article 9 of the contract of 1904 reads:

"This contract will be forfeited:—IV. Through failure to take possession of the number of claims referred to in Article 7 during any of the years referred to in that Article.—In any of these cases of forfeiture the concessionaire shall lose the deposit made and also the right to continue the exploration, being subject in the second case of forfeiture, to the provisions of the respective laws."

Article 3 of the contract of 1905 reads:

"In addition to the causes of forfeiture stipulated in paragraphs I, II, and III of Article 9, this contract, as well as the one entered into on May 23, 1904, shall be forfeited as the result of failure to take possession of the number of mining claims referred to in the foregoing Article in either of the two periods to which that Article refers. The forfeiture shall be declared administratively by the Department of Public Works which in any case and before issuing the corresponding declaration, shall grant to the said Harry H. Hughes or to the company which he may organize, a period of not less than two months in which to present a defense."

The discrepancies in numbers and in the estimate of the case appearing in the several replies made by the Mexican Government to the requests of the claimant for the return of the deposit are clearly evident. But the Commission thinks that as opposed to the precise facts set forth above, those discrepancies are unimportant since it appears that for some unexplainable reason the Mexican authorities were in error but only as to the number of mining claims credited in favor of the claimant, but that there was no error as to the circumstance of the failure of Hughes to comply with his contract. The first notice to the claimant that the contract was forfeited was given on June 13, 1908, by the Minister of Public Works, Sr. O. Molina. In that letter he was told first that he was obligated to take possession of three hundred mining claims during the stipulated periods, and then that he had filed only four denouncements embracing two hundred and forty claims since the denouncement of the mine "Cuauhtemoc" of twenty-two claims could not be considered, as application therefor had been made prior to the promulgation of the contract, but that even assuming the denouncement to be valid, "You still would not have complied with the stipulations". The other replies are likewise in error as to the calculations, but not as to the substance.

There is nothing in the foregoing in conflict with the view of the case taken by this Commission, since the statement of Sr. Molina with respect to the mining claims denounced, although erroneous numerically, was that which, the two months given to the claimant in which to present his defense having transpired, subsequently served as a basis for declaring the forfeiture and the loss of the deposit of 2,000 Mexican pesos.

The claimant further alleges, on the other hand, that if the titles to the "La Conquista" (20) were not issued until 1908, it was not due to any fault of his, but to the fault of the Mexican Government whose officials were negligent. The Commission has not before it sufficient evidence to determine this point; but even admitting negligence on the part of Mexican officials, this fact does not destroy the positive negligence in which the claimant incurred with respect to the mining properties "Oro Escondido" and "El Lucero" as previously stated, which are those which gave rise to the nonfulfillment of the contract.

It is proper to examine now whether the circumstances that the Mexican Government granted mining titles to the claimant even in 1908, a year and a half after the three years stipulated in the contract, means that it was or might be considered as being in force or that the Mexican Government had relinquished its right to enforce the stipulated guarantee in the event of non-compliance of the contract on the part of the concessionaire. According to the mining laws of Mexico exploration on national lands may be made freely by any person, but the Government can grant special permits securing for a fixed period the privilege that only the holder of the said permit may apply for mining concessions in certain zones. Through the contracts here in question, the Mexican Government secured to Hughes the right of being the only person who could make denouncements during three years. This was the only obligation of the contracting Government. The claimant, on his part, undertook the obligation of exploring the land and of obtaining mining titles to three hundred mining claims under penalty of losing the deposit made as a guarantee. But he clearly obligated himself (Art. 2 of the contract of 1904) to apply for the titles according to the procedure of the law then in force. The only thing the contract covered was the privilege of exploration; in respect to the matter of titles the claimant was on the same footing as any other person. Accordingly, even if the claimant did not explore and obtain his titles in three years, he could obtain those same titles at any time in the same manner as the other inhabitants of the Republic, inasmuch as the three years of the concession having transpired, the land was automatically declared open. (Articles 13 and 15 of the Law and 10, 11, 12, 13 and 14 of the Regulation). Therefore the fact that the Mexican Government granted titles to the claimant after the expiration of the three years, does not signify recognition of the continued existence of the contract, which moreover would have terminated automatically at the end of its period, since the contract in question had a fixed time limit.

With respect to the coupons of the deposited bonds, which matured prior to the date of the forfeiture of the contract, and which amounted to \$240.00 Mexican currency, the Mexican Government states that they always have been and are at the disposition of the claimant. That amount must therefore be delivered to the claimant.

In view of the foregoing the claim of Harry H. Hughes with respect to the return of the bonds must be disallowed, and an award entered for the return of the amount of the coupons expressed in United States currency.

Decision

The United Mexican States shall pay to the United States of America on behalf of Harry H. Hughes, the sum of \$119.64 (one hundred nineteen dollars and sixty-four cents) United States currency, with interest at six per centum per annum, from June 13, 1908 until the date on which this Commission shall render its final decision.

MARTHA ANN AUSTIN (U.S.A.) *v.* UNITED MEXICAN STATES

(October 24, 1930. Pages 108-112.)

NATIONALITY, PRESUMPTION OF. When evidence in support of claimant's nationality establishes a strong presumption of American nationality and respondent Government filed no evidence to the contrary, *held*, American nationality sufficiently proven.

DENIAL OF JUSTICE.—FAILURE TO APPREHEND OR PUNISH.—BURDEN OF PROOF.—EFFECT OF NON-PRODUCTION OF EVIDENCE AVAILABLE TO RESPONDENT GOVERNMENT. Claimant's husband was murdered in Mexico and murderer was reported to have escaped to the mountains in rebel territory. An American consular report made over a year later noted thirteen murders of American citizens, including instant case, in which no judicial proceedings had been instituted. No evidence to justify or explain such inaction of the authorities was produced by respondent Government. Claim *allowed*.

Cross-reference: British Yearbook, Vol. 12, 1931, p. 167.

Comments: Edwin M. Borchard, "Recent Opinions of the General Claims Commission, United States and Mexico", Am. J. Int. Law, Vol. 25, 1931, p. 735 at 739.

The Presiding Commissioner, Dr. H. F. Alfaro, for the Commission:

This claim is presented by the Government of the United States of America on behalf of Mrs. H. W. Austin, against the United Mexican States for the purpose of obtaining an indemnity for losses and damages arising from the murder of Samuel Alfred Austin, son of the claimant, at the hands of a Mexican national and from the failure of the Mexican authorities to take adequate measures for the apprehension and punishment of the person responsible for the death of Austin.

The claimant Government maintains that this omission constitutes a denial of justice which merits an indemnity of \$25,000.00 United States currency, or its equivalent, with interest.

Simultaneously with the filing of the Memorial a motion praying for the substitution of the name of Martha Ann Austin as the claimant in place of the name of Mrs. H. W. Austin, was filed. The Commission, following the practice already established in analogous cases, granted the motion by Order No. 116.

The facts upon which the claim is grounded occurred as follows: In the late afternoon of August 31, 1918, at the "Alamo" Camp of the Penn Mex